

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT NO.)
31711-g410 BY MILLER COLONY, INC.) FINAL ORDER

* * * * *

The time period for filing exceptions or objections to the Proposal for Decision (hereafter, "Proposal") has expired, and timely exceptions were received from Raymond L. Anderson and Crumpled Horn, Inc. Jacob Wipf for Miller Colony filed a letter of clarification of legal description for the point of diversion. Mr. Gregory L. Curtis, Esq. filed a copy of a settlement executed between A.B. Guthrie III and the Applicant. For the reasons stated below, and after having given all the comments and objections full consideration, the Department of Natural Resources and Conservation (hereafter, "Department" or "DNRC") hereby accepts and adopts the Findings of Fact, and Conclusions of Law as contained in the Hearing Examiner's Proposal for Decision of February 21, 1984, and incorporates them herein by reference except as expressly modified below.

A. Department's Response to Objections

1. Crumpled Horn

Although this Objector failed to appear at the hearing, pursuant to telephone conversation with the Hearing Examiner, it filed an objection to the Proposal for Decision. Prepared by Ann

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C. Stradley, hydrogeologist, the objection is a well written report detailing various facts about the Muddy Creek Aquifer, and drawing conclusions about the effects of the Applicant's proposed use. Unfortunately, the record in this matter closed as of the end of the hearing. The objection stage is one in which parties may object that the proposal is not supported by the record, not one in which additional facts may be garnered. For the Hearing Examiner to consider the factual arguments contained in Crumpled Horn's report would deny the remaining parties their right of cross-examination of the witness (the author of the document setting forth the facts) and thus constitute a denial of their procedural rights to due process of law. MCA § 2-4-612; Hert v. J.J. Newberry, 178 Mont. 355, 584 P.2d 656, rehearing denied 179 Mont. 160, 587 P.2d 11 (1980); In the Matter of the Application for Beneficial Water Use Permit No. 35527-s41H by Glenn H. Lehrer, Proposal for Decision, April 4, 1984.¹

2. Raymond L. Anderson

Mr. Anderson notes the planned water study of the area by Teton County Soil Conservation Service, and suggests the permit be withheld pending results of that study. He notes that if water is determined not to be available, "considerable expenses will be imposed unnecessarily on Miller Colony."

¹ The Department notes the cogent arguments presented by Crumpled Horn and regrets the information was not presented on the record. Further, Crumpled Horn had actual notice of the hearing, including a personal telephone reminder, to which Mr. Chalmers responded that Crumpled Horn did not wish to attend the hearing.

The Department notes that all provisional permits are not only subject to all prior existing rights, but also to any final determination of existing water rights, as provided by Montana Law. MCA § 85-2-312(1), Title 85, Chapter 2, Part 2, MCA. If the Applicant's use interferes with existing rights, after complaint investigation and proof thereof it will be ordered to be shut-off. As with all applicants for permit, this Applicant proceeds at its peril, and is authorized only to take its place on the ladder of priorities on the source. See, In the Matter of the Application for Beneficial Water Use Permit No. 26858-s40H by IX Ranch 6, Proposal for Decision January 11, 1982, Final Order March 5, 1982. It is not within the Department's authority to assess the economic feasibility or wisdom of an applicant's use: compare, MCA § 85-2-311(1) to MCA § 85-2-311(2)(a)(c).

Further, the Department notes the uncertainty regarding the amount of available water in the source. The verification process will serve to ensure the vested right eventually granted, if any, will comport with the volume of water which proves reachable, and which is actually appropriated by the Applicant. MCA § 85-2-315.

3. Miller Colony, Inc.

Jacob P. Wipf submitted a letter correcting the legal description for the point of diversion. The correct point of diversion should read SE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ rather than the stated NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$. The Department notes the correction but because of the permit condition later agreed to by the Applicant, and incorporated into the Permit as paragraph F, the Department will specify the diversion point as E $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$.

4. A.B. Guthrie III.

By and through his attorney, Mr. Guthrie submitted an executed Stipulation for Settlement of Water Permit Dispute. Therein, the parties (Miller Colony, Inc. and Mr. A.B. Guthrie III) agreed that Mr. Guthrie's withdrawal of objection was conditioned upon inclusion of their paragraph number 1 in the Permit for which Applicant hereby applies. (See, 1 and 5, Stipulation, Exhibit 1 attached hereto.)

The Hearing Examiner notes that, in order to clarify these parties' intent; to determine if they intended by their stipulation that their paragraph be the sole condition of the Permit, replacing proposed condition C, she contacted the respective attorneys on May 22 and May 23. Because the counsel indicated a failure to agree on that point, the Department need make the determination of the need for condition C on its own. That is, the Objector did not, by executing the stipulation, waive the protection of condition C, and admit that no adverse affect would accrue to him so long as the paragraph 1 were included in the Permit.

The protection of condition C is tailored to prevent the interference with Mr. Guthrie's ditch which was predicted to occur should the water table rise to at or near the bottom of the ditch. (See, Finding of Fact No. 14, Proposal.) Therefore, the Provisional Permit herein authorized will retain the condition that the Applicant must cease pumping should that occur. However, to alleviate unnecessary recording, the condition C has

been modified to require only that upon construction of the appropriative works, the Applicant must clearly mark, in the pit, the level of the bottom of Mr. Guthrie's ditch. Whether the water table rises to intercept that level then is easily ascertained by a glance. Should this occur, the Applicant must notify Mr. Guthrie, and cease pumping until the situation is reversed. Although this revised condition depends upon the good will of the Applicant to comply, the Department has absolutely no reason to believe that the Applicant will not comply with the terms of the permit. The Department notes, in fact, that the letter filed by Mr. Wipf, in response to the Proposal, indicated a willingness to accept even the more onerous terms of the Proposed Condition C. The terms of paragraph 1 are within the Department's authority to include in the Permit. MCA § 85-2-312.

The remainder of the stipulation is not within the Department's authority to include in the Permit, as the Department has no jurisdiction over easements and related property rights. The authority to condition a permit is limited, in these circumstances, to conditions devised to protect the water rights of prior appropriators, and does not include the authority to condition a permit in order to settle other ongoing disputes among the parties. See, MCA § 85-2-312.

WHEREFORE, based on the record herein, including the Proposal for Decision incorporated herein, the Department hereby makes the following:

ORDER

Subject to the terms, restrictions and limitations expressed below, the Application for Beneficial Water Use Permit No. 31711-g410 is hereby granted to Miller Colony, Inc. to appropriate 1257 gallons per minute up to 275 acre-feet per year for supplemental irrigation of 183 acres: 103 acres in the NW $\frac{1}{4}$ Section 17, Township 25 North, Range 5 West; and 80 acres on the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 17, Township 25 North, Range 5 West, all in Teton County, Montana. The source of supply shall be a groundwater pit, drawing from waters which are a part of the surface waters of Ralston Gap. The point of diversion shall be in the E $\frac{1}{2}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 17, Township 25 North, Range 5 West, Teton County, Montana. The waters provided for herein shall not be diverted prior to April 15 of any given year nor subsequent to October 15 of any given year. The priority date for this permit shall be February 13, 1981 at 8:31 a.m.

This Permit is expressly made subject to the following terms, restrictions, and limitations.

A. Any rights evidenced herein are subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize diversions by the Permittee to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be diverted from the source of supply more waters than are reasonably required for the purposes provided for herein. At all times when water is not so required, the Permittee shall cause and otherwise allow said waters to remain in the source of supply.

C. Upon construction of the pit appropriative works, the Applicant shall clearly mark, using any durable, indelible marking device, the level, at the closest point, of the bottom of Mr. Guthrie's ditch. The mark must be clearly visible, and made inside the pit to clearly reflect when the water level of the pit indicates the water table has intercepted the level of the ditch. At such point, the Applicant shall cease pumping, and notify Mr. Guthrie of same. As soon as the situation is reversed, the Applicant may resume pumping, upon notification of Mr. Guthrie.

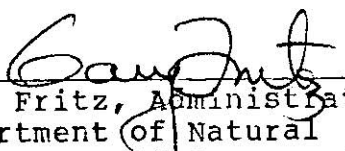
D. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

E. If at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit


should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

F. No pit, well, reservoir, pond or gravel removal area shall extend to within four hundred (400) feet of the Guthrie Ditch. If Miller Colony, Inc. removes gravel or otherwise expands the pit, well or other water accumulation or drainage facility to less than 400 feet from the Guthrie Ditch, Miller Colony, Inc. must line, at its expense, portions of the Guthrie Ditch which are within 400 feet of such well, pit, reservoir, or other water facility. For purposes of this Permit, the Guthrie ditch is as provided for in paragraph 2, of Exhibit 1, attached hereto.

DONE this 14 day of June, 1984.



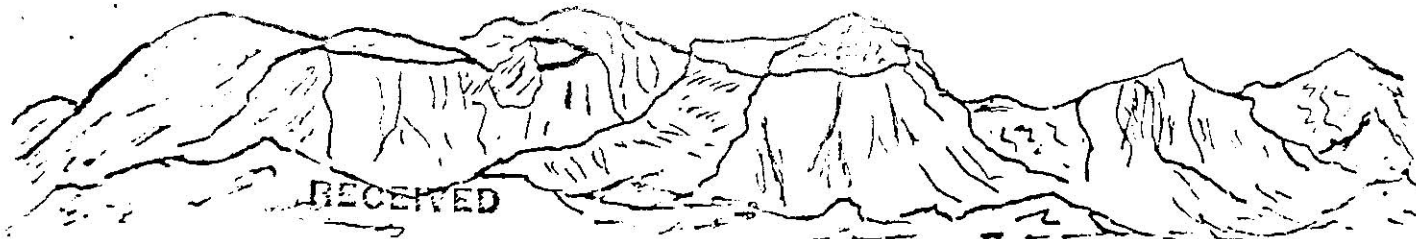
Gary Fritz, Administrator
Department of Natural
Resources and Conservation
32 S. Ewing, Helena, MT
(406) 444 - 6605



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.



APR 24 1984

LEO H. MURPHY
GREGORY L. CURTIS
R. L. STONEY BURK

MONT. DEPT. of NATURAL
RESOURCES & CONSERVATION

Murphy, Curtis & Burk
Law Office

104 MAIN AVE.
P. O. BOX 70
CHOTEAU, MT 59422
(406) 466-5755

April 19, 1984

SARAH A. BOND, HEARING EXAMINER
DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION
32 S EWING
HELENA, MT 59620

RE: WATER USE PERMIT NO. 31711-g410 BY MILLER COLONY, INC.

Dear Ms. Bond:

Enclosed please find a copy of the Settlement in the above-mentioned matter and executed by all interested parties in accordance with the stipulation. We request that the Order should reflect the terms and conditions of this proposed settlement.

If you have any questions or comments, please feel free to contact my office. Thank you.

Yours truly,

MURPHY, CURTIS & BURK

BY

GLCsm1

ENC.

1. Settlement

cc: Miller Colony, Inc.
Raymond Anderson
A.B. Guthrie, III
Robert Woodahl
Alvin G. Guse
Crumpled Horn
Joe Lee
Bob Larson

CASE # 31711

PARTIES

The parties to this stipulation are MILLER COLONY, INC., (hereinafter called Miller) as applicant, through its representative and President, Jacob Wipf of Choteau, Teton County, Montana, and A. B. GUTHRIE, III, (hereinafter called Guthrie) as objector, of Choteau, Teton County, Montana.

RECITAL

The purpose of this stipulation is to settle an ongoing dispute stemming from an objection raised by Guthrie, to a water permit application No. 31711-g410 submitted by Miller to the Department of Natural Resources (hereafter the DNRC) for the purpose of constructing a well or pit on the Miller property from which Miller will extract irrigation water. It is the desire and intent of the parties signing this stipulation to settle the dispute and clear the objection pursuant to this stipulation as hereinafter set forth. The parties have also attempted to deal with other related matters concerning their mutual water and land use. Exhibit 1 is attached for illustrative purposes.

STIPULATION

The undersigned, being parties to the proceedings dealing with hearings and negotiations involving a water permit application submitted by Miller, do hereby stipulate, consent, and agree to the following terms and conditions:

1. Guthrie agrees to withdraw his objection to the application of the Miller Colony, Inc., and to the proposal for decision issued by the DNRC concerning the Miller application, dated February 21, 1984, upon the condition that no pit, well, reservoir, pond, or gravel removal area shall extend to within four hundred (400) feet of the Guthrie Ditch, described herein. Provided that if Miller desires to remove gravel or otherwise expands the pit, well or other water accumulation or drainage facility to less than

CASE # 31711

400 feet from the Guthrie Ditch, herein described, Miller may do so, but Miller agrees to line, at its expense, portions of the Guthrie Ditch which are within 400 feet of such well, pit, reservoir or other water facility.

2. Miller hereby agrees to permit Guthrie to place an irrigation ditch (the "Guthrie Ditch") sufficient to transport his water from eastern boundary of his property in the SW $\frac{1}{4}$ SW $\frac{1}{4}$, Section 17, Township 25 North, Range 5 West, M.P.M., along the northern edge of the S $\frac{1}{2}$ S $\frac{1}{2}$ of said Section 17 to a bridge located adjacent to the northeast corner of the S $\frac{1}{2}$ S $\frac{1}{2}$ of said Section 17. The Guthrie Ditch on the property of Miller begins at point A and ends at point B as shown on Exhibit 1. Miller agrees to execute and deliver a fully recordable easement (drafted at the expense of Guthrie and reviewed by Miller's attorney) to Guthrie describing said ditch and providing Guthrie, his heirs, personal representatives, and assigns with the right to construct, maintain, repair, replace, line and transport water through said ditch. The easement shall reserve to Miller all right of use and enjoyment to the property not inconsistent with the full use and enjoyment of the easement, including by way of example but not by way of limitation, the right to flume ditches across the Guthrie Ditch, to plant crops or grow pasture grasses to the edge of the Guthrie Ditch. The Guthrie Ditch shall not be fenced.

The easement shall run approximately parallel to, and just to the south of, an existing east-west fence located on the Miller property.

The parties hereto agree that the easement shall permit the ditch to be approximately three feet deep at its west junction with the Miller property, where it crosses the Farmers Cooperative Canal Company ditch, and to be as deep as the present water course at the easternmost point of the Miller property, with a constant

slope to the east, within normal construction standards and said slope being the minimum slope necessary to move the water between the two points A and B on Exhibit 1. The ditch must make a gradual turn northeast of the crossing the Farmers Cooperative Canal Company Ditch to the parallel line of the Miller fence. Likewise, because the highway bridge is somewhat south of the parallel line adjacent to the east-west Miller fence, the Guthrie Ditch will make a nearly straight approach into the highway bridge, and lying south of the Miller fence. Guthrie agrees to disturb as few trees as possible to make the ditch smoothly through the Miller property. Under no circumstances may the bottom of the ditch intercept the water table as it now exists.

3. Guthrie is completing construction of his water drainage system and perfecting his water right permit No. 11588-g410, as granted by the DNRC in August, 1978. Guthrie and Miller hereby agree that Guthrie may place his drainage system no closer than 100 feet south of the centerline of an existing Miller ditch, presently running approximately east-west and located on the following described property: S $\frac{1}{2}$ of Section 18 and NW $\frac{1}{4}$ of Section 19, Township 25 North, Range 5 West, M.P.M. and N $\frac{1}{2}$ N $\frac{1}{2}$, Section 24, Township 25 North, Range 6 West, M.P.M. which ditch transports water from the Teton River, Ralston Gap Coulee and Blixrud property through the Guthrie property to Miller property. Additionally, one portion of the Guthrie property has a water drainage problem, for about 100 yards parallel and adjacent to the Miller ditch, which will require the drainage system to be less than 100 feet from the Miller ditch. In that 100-yard area, the drainage system shall be no closer than 60 feet to the center of the Miller ditch. Access for maintenance and repair will normally be confined to ditch banks. However, each party shall have reasonable access across the other party's land when there is an emergency or when the equipment used may not practicably or safely be confined to the ditch bank.

4. With the exception of Guthrie's water right under permit No. 11588-g410 and Miller's water right to be issued pursuant to

application No. 31711-g410, nothing in this stipulation shall serve to divest the parties hereto, or to treat as abandoned, any existing water right or claim for water now or in the future.

5. The parties stipulate that the DNRC shall approve Miller application No. 31711-g410, provided that said permit incorporates paragraph 1 hereof.

6. Guthrie hereby waives his other objections to the approval of the application of the water permit No. 31711-g410. If the DNRC fails to incorporate paragraph 1 of this stipulation, this stipulation shall be null and void in its entirety.

7. This stipulation shall be enforceable by either of the parties hereto. This stipulation will remain enforceable subject only to modification by an authorized court of law, in accordance with water adjudication proceedings or other water right determination by a court of proper jurisdiction, or by the parties hereto. The parties hereto agree that each is bound by this stipulation and either may enforce this stipulation in any manner consistent with the laws of the State of Montana, including, but not limited to, the right of specific performance.

8. The parties agree that the rights conferred by this stipulation shall be appurtenant to the real property of the parties hereto and shall be enforceable by their respective heirs, personal representatives, and assigns.

9. In the event of a dispute arising concerning the terms and conditions set forth in this stipulation the court may grant to the prevailing party such attorney's fees and costs as the court may deem reasonable.

10. Each of the parties hereto may not proceed with the activities and construction necessary to complete the projects set forth in this stipulation until a final order is entered by the DNRC and until the easement permitting such party to proceed is

executed.

DATED this 27th day of April, 1984.

MILLER COLONY, INC.

ATTEST:

By Jacob P. Wipf
President

David D. Hofer
Secretary

(CORPORATE SEAL)

A. B. Guthrie, III
A. B. GUTHRIE, III

STATE OF MONTANA)
County of Teton) ss.

On this 27th day of April, 1984, before me, the undersigned, a Notary Public for the State of Montana, personally appeared JACOB P. WIPF, known to me to be the President of Miller Colony, Inc., and David D. Hofer, known to me to be the Secretary of Miller Colony, Inc., known to me to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that such corporation executed the same in accordance with the articles and by-laws of the corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year first hereinabove written.

(SEAL)

Shirley M. Scrum
Notary Public for the State of Montana
Residing at Choteau, MT
My Commission expires 1-5-86

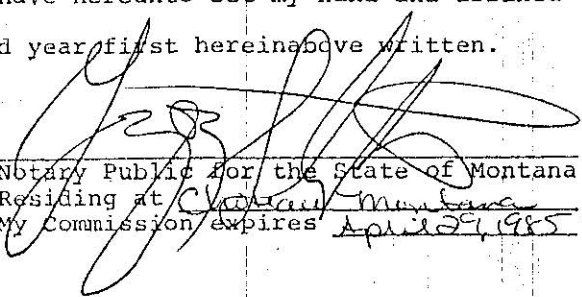
STATE OF MONTANA)
County of Teton) ss.

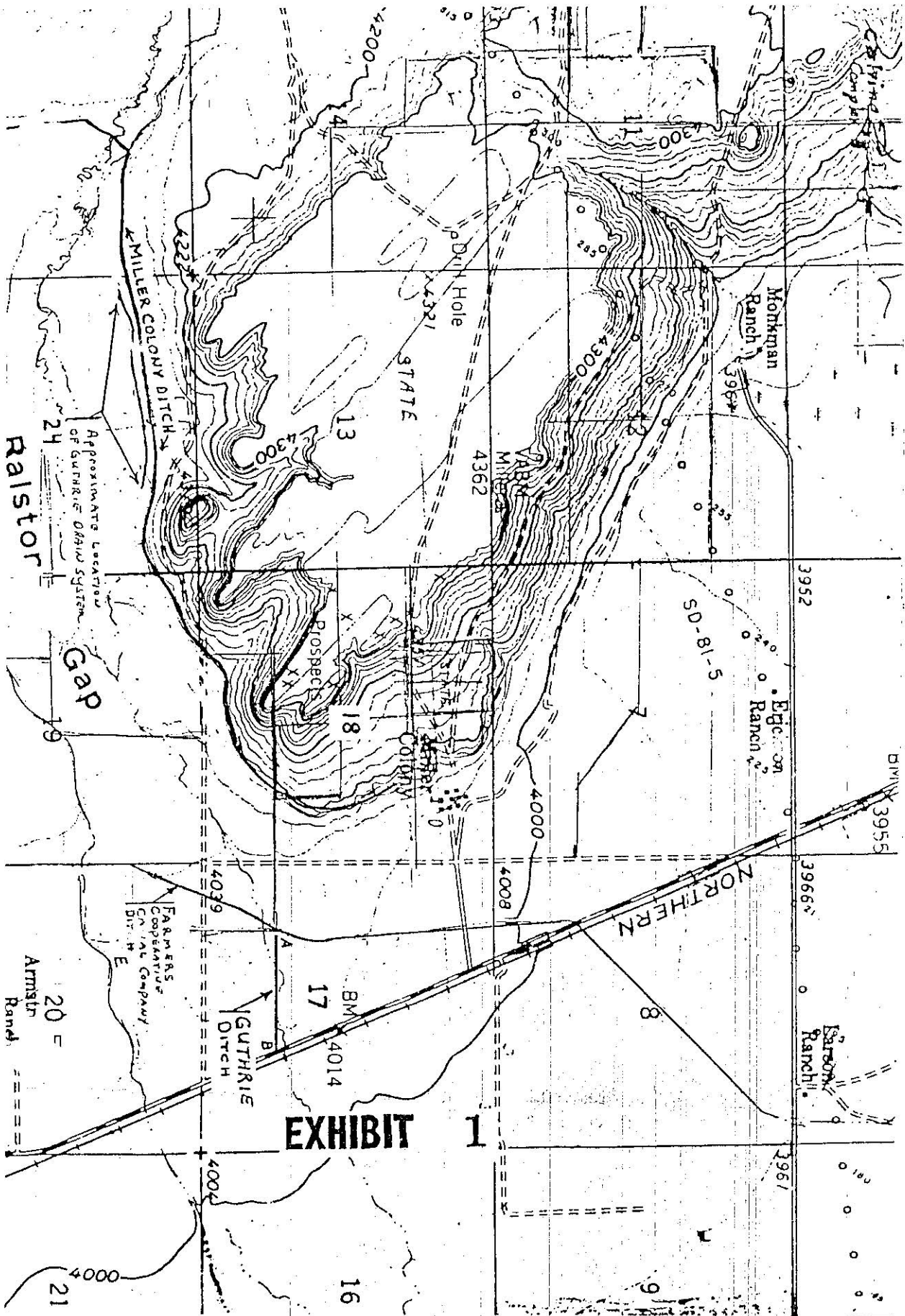
On this 27th day of April, 1984, before me, the undersigned, a Notary Public for the State of Montana, personally

appeared A. B. GUTHRIE, III, known to me to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year first hereinabove written.

(SEAL)


Notary Public for the State of Montana
Residing at Claremont, Montana
My Commission expires April 29, 1985



BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT NO.)
31711-g410 BY MILLER COLONY, INC.)

I, Shelly M. Larson, Secretary for MURPHY, CURTIS &
BURK, hereby certify that on the 23rd day of April, 1984, I
deposited in the Post Office at Choteau, Montana, in an
envelope securely sealed, with postage prepaid, and
addressed to:

ROBERT WOODAHL, CHOTEAU, MT. 59422
BERT GUTHRIE, CHOTEAU, MT. 59422
RAYMOND ANDERSON, BOX 645, CHOTEAU, MT. 59422
MILLER COLONY, INC., RR 2, BOX 110, CHOTEAU, MT. 59422
ALVIN GUSE, RR 2, CHOTEAU, MT. 59422
CRUMPLED HORN, c/o LESLIE CHALMERS, CHOTEAU, MT. 59422
BOB LARSON, DEPT. OF NAT. RES., HAVRE, MT. 59501
JOE LEE, BOX 154, CHOTEAU, MT. 59422
SARAH BOND, HEARING EXAMINER, DEPT. OF NAT. RES., HELENA,
MT. 59620

a true and correct copy of the foregoing STIPULATION FOR
SETTLEMENT OF WATER PERMIT DISPUTE in the above captioned
case.

MURPHY, CURTIS & BURK

By:

Shelly M. Larson

CASE # 31711

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on June 18, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Miller Colony, Inc., Application No. 31711-g410, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Miller Colony, Inc. RR 2, Box 110, Choteau, MT 59422
2. Raymond Anderson, Box 645, Choteau, MT 59422
3. Greg Curtis, Murphy, Curtis & Black, P.O. Box 70, Choteau, MT 59422
4. Lester H. Loble, II, Attorney, Box 176, Helena, MT 59624
5. Alvin G. Guse, Rt. 2, Choteau, MT 59422
6. Crumpled Horn, c/o Leslie Chalmers, Choteau, MT 59422
7. Crumpled Horn, c/o Ann Stradly, Box 1287, Belgrade, MT 59714
8. Joe Lee, Box 154, Choteau, MT 59422
9. Bob Larson, Havre Field Office (inter-departmental mail)
10. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 18th day of June, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

John P. G. [Signature]
Notary Public for the State of Montana
Residing at Helena Montana
My Commission expires 1-21-1987

CASE # 31711

BEFORE THE DEPARTMENT
OF NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)
FOR BENEFICIAL WATER USE PERMIT NO.) PROPOSAL FOR DECISION
31711-g410 BY MILLER COLONY, INC.)

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing, in the above captioned matter was held in Choteau, Montana, on October 12, 1983.

The Applicant, Miller Colony, Inc., (hereafter "Applicant") appeared through its representative and President, Jacob Wipf. Appearing with Mr. Wipf were Mr. Joseph Hoeffler and David Hoeffler.

Objector A.B. Guthrie, III appeared personally and by and through his counsel, Robert Woodall.

Objectors Raymond Anderson and Alvin G. Guse appeared personally, but declined to participate in the hearing.

Objector Crumpled Horn did not appear.

Joe Lee appeared pro se, but is not a party hereto, having failed timely to object to the application in issue herein.

Wayne Wetzel, Phd., and Marvin Cross, appeared as Department of Natural Resources and Conservation (hereafter "DNRC" or "Department") expert staff witnesses.

STATEMENT OF CASE

The Applicant seeks to appropriate up to 2.8 cubic feet per second (hereafter "cfs") or 1257 gallons per minute (hereafter "gpm") up to 275 acre-feet per year for irrigation use from April 15 to October 15, inclusive. The water is to be withdrawn by means of pump from a a ground-water pit in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 17, Township 23 North, Range 5 West, Teton county, Montana, and to be used for supplemental irrigation for barley and grain crops grown on 183 acres in Section 17, Township 25 North, Range 5 West; 103 acres being in the NW $\frac{1}{4}$; 80 acres being in the SW $\frac{1}{4}$.

Raymond Anderson timely filed an objection to the application, stating generally that he owns water rights which he exercises by means of 4 wells, the alleged source of water for his wells is the Ralston Gap Aquifer, due west of the Applicant's proposed pit. The Applicant's pit would allegedly deplete this aquifer causing adverse affect on Mr. Anderson's prior water rights.

Ralston Gap Cattle Company and A.B. Guthrie, III, timely filed an objection to the application, alleging generally that the Applicant's pit is in close proximity to his surface water right, which he exercises by means of a drain ditch and sprinkler system, and that because the surface water and ground water are hydrologically connected, pumping from the pit would adversely affect his prior right. He believes the Applicant's pumping will lower the water table, and induce increased seepage from his ditch, approximately 300 feet from the Applicant's site. Mr.

Guthrie has a provisional permit to appropriate for 14.95 cfs flowing through the ditch, which he uses to irrigate his lands east of the Applicant's site. Any increased seepage resulting from the pumping would thereby adversely affect Mr. Guthrie, who uses all the water flowing in his ditch.

Alvin G. Guse timely filed an objection alleging generally that the proposal would lower the water table and thereby adversely affect his well water right.

Crumpled Horn timely filed an objection stating that the aquifer was already in danger of being mined to the adverse affect of all its users, and that because of a court imposed requirement that, pursuant to exercise of its Provisional Permit Number 4516-g410, it pay for monitoring the aquifer, no further appropriations from the aquifer can be allowed without requiring the Permittee to install his own monitoring system and pay damages for lowering the water table and pressure. Further, Crumpled Horn stated it believed it was being discriminated against because of other diversions allegedly being permitted from the same aquifer.

EXHIBITS

The Applicant offered the following exhibit into the record.

a. A map of the proposed project area showing, inter alia, the proposed pit, place of use, and Mr. Guthrie's drain ditch.

Over objection by Mr. Guthrie, the map was received into the record for illustrative purposes. Subsequent to the offering of the map into the record, testimony by Marvin Cross showed the map

to be a reasonably accurate portrayal of the project and surrounding area.

Mr. Guthrie offered the following exhibits into the record.

a. A photocopy of a Departmental Provisional Permit to Appropriate Water No. 11588-g410 issued to A.B. Guthrie, III and Alva Armstrong, with a priority date of March 7, 1977 at 1:35 p.m. (2 pages).

b. A photocopy of a Departmental memorandum of July 6, 1983, from Marvin Cross to File No. 51,285-g410 by Miller Colony, Inc. (3 pages).

Both of Mr. Guthrie's exhibits were received into the record.

The Department offered the following exhibits for submission into the record.

a. A map, prepared by Marvin Cross, depicting the proposed pit, place of use, and project environs.

b. A Departmental memorandum, dated May 5, 1982, which is a geohydrologists report on Application No. 31711 (Miller Colony, Inc.) prepared by Wayne Wetzel.

Both of the Department's exhibits were received into the record.

PRELIMINARY MATTERS

Mr. Guthrie, through counsel, made numerous legal substantive, procedural, and evidentiary objections. Pursuant to MCA 2-4-612(2), the Hearing Examiner hereby makes the following rulings on said objections.

1. Surface v. groundwater

Much ado was made over the need to distinguish the waters in issue herein as either surface or groundwater. Mr. Guthrie requested the Hearing Examiner to take notice of the Department's decision in "In the Matter of the Applications for Beneficial Water Use Permits Nos. 31585-s410, and 35862-g410 by Joe R. Lee, Proposal for Decision of March 28, 1983, Final Order of June 24, 1983. Despite requests for supporting argument, Mr. Guthrie simply suggested the Hearing Examiner read those decisions and guess at Mr. Guthrie's point.

Having read those decisions, and having reviewed relevant Montana law on point, the Hearing Examiner fails to find the distinction relevant to the case herein. Although other appropriation states have struggled with the distinction. See, Kuiper v. Lundall, 187 Colo. 40, 529 P2d. 1328 (1974) cert. den. 421 US 996 (1975), Fellhauer v. People 167 Colo. 320, 447 P2d. 986 (1968), the Montana Constitutional Convention along with our legislature have, in their wisdom, solved the matter for us. First, the Montana Constitution of 1972 stated, in relevant part, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law". Montana Const. Art IX, §313. This subjection of all waters, however arising or occurring within the state, to the prior appropriation system starkly contrasts with the Colorado consitutional treatment of water, which has been the focal point in the debate in Colorado.

"The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied."

Colorado Const. Act. XVI §§ 5,6. (emphasis added).¹

Second, the Montana Water Use Act, MCA Title 85, clearly indicates a legislative intent to subject all waters of the state to the prior appropriation system.² With the exception of MCA §§85-2-501, et seq. (1983), which allows the Boards designation of controlled groundwater areas, the occurrence of water either below or above the ground is irrelevant to its subjection to the priority system. The key, in Montana, is whether the water is

¹ Because of the uncertainty whether Colorado intended to include underground and non-tributary water into the appropriation system which specifically applied only to surface water, the distinction between tributary and non-tributary, and surface and groundwater, has attained significant dimensions there. See Also, the "Huston" cases, Southeastern Colorado Water Conservancy District v. Huston, 197, Colo. 365, 593 P2d. 1347 (1979), Colorado Dept. of Natural Resources, Div. of Water Resources, John Huston, et.al., v. Southwestern Colorado Water Conservation District, et.al., 12, Colo. Lawyer, 1548 (1983).

² This, as opposed to a rule allowing a surface land owner (in fee) the exclusive right to use and control waters arising under, or confined under, the boundaries of his land.

tributary, or, is a part of, other surface waters.³ Waters, flowing below the ground, but a part of surface water, are included within the definition of water, "...all water of the state, surface and subsurface, regardless of its character or manner of occurrence, including but not limited to geothermal water, diffuse surface water, or sewage effluent." MCA § 85-2-103(14) (1983). And, when read in conjunction with the definition of "Appropriate", and the statutory provisions for the appropriation of water, clearly, the only water possibly subject to separate administration or control is that groundwater not a part of any surface water, i.e.: non-tributary.⁴ All appropriations are subject to the permit requirements, the criteria for departmental issuance thereof being the same for all waters.⁵ See generally, Stone, Montana Water Law for the 1980's pp. 97-102.

³ The Montana Water Use Act provisions for groundwater specifically define groundwater as, "any freshwater beneath the land surface or beneath the bed of a stream, lake, reservoir, or other body of surface water and which is not a part of that surface water." MCA § 85-2-501(3) (1983) (emphasis added), MCA § 85-2-103(8) (1983).

⁴ "Appropriate" means to divert, impound, or withdraw (including by stock for stock water) a quantity of water...." MCA § 85-2-301. "...a person may not appropriate water... except by applying for and receiving a permit from the Department". MCA § 85-2-302.

⁵ The sole exceptions to the permit requirements are for appropriating non-tributary groundwater by means of a well or a developed spring with a maximum appropriation of less than 100 gallons per month and "appropriations by impoundment or pit for use by livestock if the maximum capacity of the impoundment or pit is less than 15 acre-feet and the appropriation is less than 30 acre-feet per year and is from a source other than from a perennial flowing stream, and the impoundment or pit is to be constructed on and will be accessible to a parcel-land that is owned or under the control of the Applicant and that is 40 acres or larger." MCA § 85-2-306(1).

In conclusion, the facts of the instant case clearly show that the water source for this Applicant is not non-tributary groundwater within the meaning of MCA § 85-2-103(8) (1983) and MCA § 85-2-501(3) (1983). It is, rather, water, within the meaning of MCA § 85-2-103(14).⁶ See, In the Matter of Application for Beneficial Water Use Permit No. 14,965-s41C and Application for Change of Appropriation Water Right No. 19,230-c41C by Thomas H. Boone, Trustee, Final Decision May 21, 1981 at page 101. For further discussion of prior Montana Case Law.

The Hearing Examiner follows the holding in Joe Lee, that the waters here, as there, are not groundwater. Mr. Guthrie's request for administrative notice of the Joe Lee decision, however, is denied. As Department precedent, the Joe Lee decision is akin to the legal authorities which the Hearing Examiner must look to for the applicable law. It is not a fact subject to official notice. "Notice may be taken of judicially cognizable facts. In addition, notice may be taken of generally recognized technical or scientific facts within the agency's specialized knowledge". MCA § 2-4-612(6) (1983) (emphasis added). This ruling is consistent with Montana case law, Hert v. J.J. Newberry 178 Mont. 355, 584 P.2d 656 (1978) at 356. and prior Department orders. In the matter of the Application for Beneficial Water Use Permit by Delbert Kunneman No. 138008, Proposal for Decision. Jan. 17, 1984.

⁶ The unanimous testimony at the hearing was that the area's subsurface and surface water are closely hydrologically connected.

2. Motions to Dismiss

Mr. Guthrie made numerous motions to dismiss for Applicant's failure to prove its case by substantial credible evidence. The motion was made at the end of Applicant's "case in chief" repeated after the Departmental witnesses testified, and again after closing the record. Mr. Guthrie's first motion was on the grounds that the Applicant had to meet its burden of proof by its own direct testimony at the hearing.

The motion as of the close of Applicant's direct testimony is denied.⁷ The result of a dismissal at this point would have been contrary to the contested case provisions of the Montana Administrative Procedures Act, MCA §§ 2-4-600, et. seq.(1983). The findings of fact must be based on the evidence in the record, and on matters officially noticed. MCA § 2-4-623 (1983). The statute clearly mandates certain materials to be included in the record, among them, "All staff memoranda or data submitted to the hearing examiner or members of the agency as evidence in connection with their consideration of the case." MCA § 2-4-614(g) (1983). Because Mr. Wetzel's geohydrology report had, long before the hearing, been so submitted, it would have violated all parties' right to cross-examine that document had the motion to dismiss been granted before Mr. Wetzel could be placed on the stand at the hearing.⁷

⁷ "A party shall have the right to conduct cross-examinations required for a full and true disclosure of the facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence". MCA § 2-4-612(5) (1983).

Further, there simply is no reason to treat the contested case hearings, especially when unadorned by legal representation on both sides, as a formal trial. On the contrary, there are good reasons against it. First, is that these hearings involve the lifeblood of the Montana farmer - waters . Second, because the Montana Water Use Act mandates Departmental approval of all new water uses, as well as changes in prior uses, the typical farmer may find himself involved in a number of these hearings. Unlike the once-in-a-lifetime civil suit, the farmer must frequent the water right hearings to pursue his own water development program, and to protect his senior rights from adverse affect by others. To expect Montana's citizenry to hire legal counsel for representation at all of these proceedings is clearly impractical. It is fundamental to the fairness of this system that it be accessible to all.

Third, in a contested case the hydrologic evidence necessary to a rational decision may be complex. The typical water user has neither the time nor the financial resources to conduct extensive data gathering and analysis. For this reason, the Department has staff experts who gather and analyze data on permit applications, for presentation on the record and for consideration by the Hearing Examiner.

Furthermore, such a motion to dismiss even under the formal Rules of Civil Procedure, Rule 41(6) M.R.C.P. cannot be granted, "where there is substantial evidence to support the complaint, but only where from the undisputed facts the conclusion

necessarily follows as a matter of law, that a recovery cannot be had on any view which may reasonably be taken from the facts established.", Claypool v. Malta Standard Garage, 96 Mont., 285, 30 P.2d 89 (1934). The Applicant's direct evidence, albeit weak, did touch upon all the requisite statutory criteria, and thus, put various facts into dispute. Mr. Wipf testified as to all statutory criteria, including his belief, based upon his experience in actually working the farm in the area, that some water would be available. The testimony of those familiar with the region by having worked the land there, is to be accorded weight in adducing the facts necessary for determinations of water availability, crop requirements, and probable consequences of new water uses, or changes. See, e.g. Worden v. Alexander, 108 Mont. 208, 90 P.2d 160 (1939).

The Motion to Dismiss as of the close of Departmental testimony is denied. All of the statutory criteria requisite for the permit issuance were put into evidence, by the Applicant, and were supported by Departmental testimony and documentary evidence.

The Motion to Dismiss as of the closing of the record of the hearing is denied, for the reasons stated above.

Mr. Guthrie also moved to dismiss Applicant's case on the grounds that the proposal in issue at the hearing was substantially different from the Applicant's original proposal, i.e.: that the Applicant now proposes to appropriate by means of a groundwater pit, whereas the original application indicated

appropriation by a 150 foot deep well. Mr. Guthrie initially supported the motion by arguing his due process right of notice had been violated; that he'd had no official notice of this change, and that he was prepared only to present his case of adverse affect against the Applicant's proposed well.

The motion was denied at the hearing, and the Hearing Examiner hereby affirms that denial. Mr. Guthrie, in fact, had notice of the change. He admitted at the hearing to having received Mr. Wetzel's geohydrology report. That report clearly states, "Miller Colony, Inc., by application 31711, propose (sic) to excavate a groundwater pit within an existing abandoned gravel pit..." Department's Exhibit No. 2, p.1. While Mr. Guthrie's counsel may not have been aware, (having been retained for this matter relatively recently), that his client was aware of the change, the client (Mr. Guthrie) was, in fact, aware of the changed proposal, and cannot prevent the Applicant from presenting its case for lack of notice.

2. Burden of Proof

Closely related to Mr. Guthrie's argument that the Applicant need make his case on his own, was his agrument that the burden of proof lies with the Applicant herein. The Hearing Examiner notes this as a correct statement of the law. The burden of proof in an administrative hearing on an Application for Beneficial Water Use Permit is, indeed, upon the Applicant. The applicable statute is susceptible of no other construction.

"...the department shall issue a permit if the applicant proves by substantial credible evidence that the following criteria are met..." MCA § 85-2-311(1) (1983).

4. Objection to Hearing Examiner's aid to Applicant.

Mr. Guthrie objected to what he perceived as the Hearing Examiner's improper assistance to Applicant's representatives. The Hearing Examiner overruled the objection, and hereby affirms same. Again, the informal nature of the permit hearings demands that the Department assist unrepresented parties in their presentation for the record.

The Hearing Examiner, after considering all of the evidence on record herein, hereby makes the following Findings of Fact, Conclusions of Law and Proposed Order.

FINDINGS OF FACT

1. The Department has jurisdiction over the subject matter and the parties herein.

2. On February 13, 1981, at 8:31 a.m., the instant application was filed with the Department.

3. The facts pertinent to the application were duly published for three (3) consecutive weeks in the Choteau Acautha, a newspaper of general circulation in the area of the source.

4. The Applicant intends to appropriate water for irrigation - a beneficial use. The amount sought by the Applicant is reasonable, and can beneficially be used for the irrigation of 80 acres of barley and small grain crops.

5. The proposed means of diversion, construction and operation of the appropriation works are a groundwater pit, from which will be pumped up to 1257 gpm (up to 275 acre-feet per year). The water will be transported through a pipe, and delivered to an existing wheel-line sprinkler system immediately northwest of the pit. The sprinkler, now, is in a position to irrigate 103 acres of Applicant's land. The additional water will enable Applicant to supplement these 183 acres. The proposed site is an abandoned gravel washing pit.

6. The water source for Applicant's project is the Ralston Gap Aquifer, and hydrologically connected with surface water in the area.

7. Mr. Guse's wells are north of the proposed site. Because of the hydrology of the area, and the distance between Mr. Guse's wells and the proposed site, Mr. Guse would not be adversely affected by Applicant's project.

8. Crumpled Horn failed to appear at the hearing, and therefore the allegations of their objection were neither supported nor contradicted by the evidence produced for the record.

9. Mr. Anderson's wells are located at such a distance from Applicant's proposed site that they would not be within the cone of depression created by Applicant's project.

10. Objectors Guse and Anderson presented no evidence at the hearing. The only evidence of possible adverse affect is the conclusions stated in Mr. Wetzel's report. Mr. Wetzel's report, being uncontradicted, provides the only basis for any findings of any possible adverse affect, or lack thereof.

11. Mr. Guthrie's drain ditch runs approximately 300 feet to the north of the proposed site. Mr. Guthrie has a Provisional Permit allowing him to use, for all practical purposes, all of the water in the ditch. (Mr. Guthrie's permit allows him to appropriate 14.95 cfs, more than the volume of water normally flowing in the ditch.) The uncontradicted testimony of Mr. Guthrie, indicated that he was, in fact, appropriating the full flow therein.

12. The water table is generally below the level of water in the ditch, so that the flow between Mr. Guthrie's water, and the water in the water table is away from the ditch. The ditch is, in other words, generally losing water to the water table below. The water flowing in the ditch comes from northwest of the proposed site.

13. The Applicant's are constrained by a layer of Colorado shale, beyond which they cannot drill or pump. The shale is approximately 17-19 feet below the ground. It is more likely than not that the amount of water for which the Applicant has applied will not be available. Because its sprinkler system is already in use, however, beneficial use can be made of whatever quantity of water is available through pumping.

14. As long as the water table in the area remains below Mr. Guthrie's ditch, water will seep from Mr. Guthrie's ditch at a rate largely unaffected by Applicant's pumping. That is, because of the hydrologic gradient, Mr. Guthrie's ditch will lose water to the aquifer. Should the water table rise to intercept

the bottom of Mr. Guthrie's ditch, the situation would reverse, and water would be seeping into the ditch from the aquifer: the aquifer in this case, would be adding water to the ditch. In this event, Applicant's pumping could induce depletion of water from Mr. Guthrie's ditch, adversely affecting his water rights to the water therein.

Based upon the foregoing Findings of Fact, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department has jurisdiction over the subject matter and the parties herein.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or *rule* have been fulfilled, therefore, the matter was properly before the Hearing Examiner.

3. Objector Crumpled Horn failed to appear at the hearing, and is in default pursuant to Administrative Rule of Montana § 1.3.214(1).

4. The Applicant's proposed use is a beneficial one.

5. The Applicant proved by substantial credible evidence that there are unappropriated waters in the source of supply: at times when the water can be put to the use proposed by the Applicant, in the amount the Applicant seeks to appropriate, and throughout the period during which the Applicant seeks to appropriate, the amount requested is available. This conclusion is hereby expressly made only because testimony at the hearing

showed that, while the amount specified in the application was not expected to be available due to the geology of the region, some amount would be available, and the Applicant is capable of using that lesser amount, and intends to use whatever amount proves to be available. While this is not always true, especially with sprinkler irrigation systems which typically require a minimum amount of pressure, in the instant case, the appropriation is for supplemental water to appropriate and divert through an existing system, hence, the problem of minimum usable water does not present itself.

6. The Applicant proved by substantial credible evidence that the water rights of a prior appropriator will not be adversely affected.

7. The Applicant proved by substantial credible evidence that the proposed means of diversion, construction, and operation of the appropriation works are adequate, and that the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved.

WHEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, restrictions and limitations described below, Application for Beneficial Water Use Permit No. 31711-g410 is hereby granted to Miller Colony, Inc. to appropriate up to

1257 gallons per minute up to 275 acre-feet per year for supplemental irrigation of 183 acres: 103 acres in the NW $\frac{1}{4}$ Section 17, Township 25 North, Range 5 West; 80 acres on the N $\frac{1}{2}$ SW $\frac{1}{4}$ of Section 17, Township 25 North, Range 5 West, all in Teton County, Montana. The source of supply shall be a groundwater pit, drawing from waters which are a part of the surface waters of Ralston Gap. The point of diversion shall be in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ SE $\frac{1}{4}$ Section 17, Township 25 North, Range 5 West, Teton County, Montana. The waters provided for herein shall not be diverted prior to April 15 of any given year nor subsequent to October 15 of any given year. The priority date for this permit shall be February 13, 1981 at 8:31 a.m.

This permit is expressly made subject to the following express terms, restrictions, and limitations.

A. Any rights evidenced herein are subject to all prior and existing water rights, and to any final determination of such rights as provided by Montana Law. Nothing herein shall be construed to authorize diversions by the Permittee to the detriment of any senior appropriator.

B. The Permittee shall in no event cause to be diverted from the source of supply more waters than are reasonably required for the purposes provided for herein. At all times when water is not so required, the Permittee shall cause and otherwise allow said waters to remain in the source of supply.


C. At the onset of each irrigation season, and on the 1st day of each month of the season, the Permittee shall measure the level of the water table at their point of diversion, and at the nearest point in Mr. Guthrie's ditch, using a surveyor's level, and as it was measured by the parties during the noon hour at the hearing in this matter. The Permittee shall contact the Havre DNRC field office, either in writing, at P.O. Box 1828, 1708 West 2nd Street, Havre, MT 59501, or by telephone, 265-5516, 265-5517, and communicate said measurements to Marvin Cross (or his designee) who shall record same, keeping a record of all such measurements at that field office. If at any time the Permittee's measurements show the water table to be at the same elevation or higher than the elevation of the bottom of Mr. Guthrie's ditch, the Permittee shall cease diverting water pursuant to this Permit, and shall not resume diversion until the situation is reversed, and the water table is more than 5 inches below the bottom of the ditch.

D. The issuance of this permit by the Department shall not reduce the Permittee's liability for damages caused by Permittee's exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittee's exercise of this permit.

E. If at any time after this permit is issued, a written complaint is received by the Department alleging that diverting from this source is adversely affecting a prior water right, the Department may make a field investigation of the project. If

during the field investigation the Department finds sufficient evidence supporting the allegation, it may conduct a hearing in the matter allowing the Permittee to show cause why the permit should not be modified or revoked. The Department may then modify or revoke the permit to protect existing rights or allow the permit to continue unchanged if the Hearings Officer determines that no existing water rights are being adversely affected.

DONE this 21st day of February, 1984.



Sarah A. Bond, Hearing Examiner
Department of Natural Resources
and Conservation
32 S. Ewing, Helena, MT 59620
(406) 444 - 6625

NOTICE

This is a recommendation, not a final decision. It is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Hearing Examiner at the Department of Natural Resources and Conservation, 32 South Ewing, Helena, Montana 59620, on or before March 12, 1984.

AFFIDAVIT OF SERVICE

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

Donna K. Elser, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on February 22, 1984, she deposited in the United States mail, Certified mail, an order by the Department on the Application by Miller Colony, Inc., Application No. 31711-g410, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Miller Colony, Inc. RR 2, Box 110, Choteau, MT 59422
2. Raymond Anderson, Box 645, Choteau, MT 59422
3. Ralston Gap Cattle Co., c/o A.B. Guthrie, III, Box 541, Choteau, MT 59422
4. Robert Woodahl, P.O. Box 162, Choteau, MT 59422
5. Alvin G. Guse, Rt. 2, Choteau, MT 59422
6. Crumpled Horn, c/o Leslie Chalmers, Choteau, MT 59422
7. Joe Lee, Box 154, Choteau, MT 59422
8. Bob Larson, Havre Field Office (inter-departmental mail)
9. Sarah A. Bond, Hearing Examiner (hand deliver)

DEPARTMENT OF NATURAL RESOURCES AND
CONSERVATION

by Donna K. Elser

STATE OF MONTANA)
) ss.
County of Lewis & Clark)

On this 22nd day of February, 1984, before me, a Notary Public in and for said state, personally appeared Donna Elser, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohr
Notary Public for the State of Montana
Residing at Montana City, Montana
My Commission expires 3-7-85

CASE # 31711